

1 UNITED STATES BANKRUPTCY COURT
2 FOR THE DISTRICT OF DELAWARE

3
4 IN RE: OWENS CORNING, CHAPTER 11
et al., Case Nos. 00-3837 through
00-3854
5 Debtors.

6 -----
7 IN RE: W.R. GRACE & CO., CHAPTER 11
et al., Case Nos. 01-1139 through
01-1200
8 Debtors.

9 -----
10 IN RE: USG CORPORATION, CHAPTER 11
a Delaware Corporation, Case Nos. 01-2094 through
et al., 01-2104
11 Debtors.

12 -----
13 Telephone Conference Call
December 29, 2003
Newark, New Jersey

14 B E F O R E: ALFRED M. WOLIN, USDJ

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17 Pursuant to Section 753 Title 28 United States Code, the
18 following transcript is certified to be an accurate record as
taken stenographically in the above-entitled proceedings.

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Official Court Reporter

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1 THE COURT: All right. I'd like to do an appearances
2 again. Mr. Mancino, is Mr. Mancino there? Mr. Monk?

3 MR. MONK: Yes, your Honor, I'm here, along with Mr.
4 Pernick.

5 THE COURT: All right. Let me list Mr. Pernick. Is Mr.
6 Robbins there?

7 MR. ROBBINS: I am, your Honor, along with --

8 THE COURT: Is Mr. Orseck here?

9 MR. ORSECK: Yes, your Honor. I'm here.

10 THE COURT: Mr. Bernick?

11 MR. BERNICK: Yes.

12 THE COURT: Mr. Devereaux?

13 MR. DEVEREAUX: Yes.

14 THE COURT: Mr. Shire?

15 MR. SHIRE: Yes, your Honor, with Jennifer Morales.

16 THE COURT: And Mr. Trachtman?

17 MR. TRACHTMAN: Yes, with Ellen Nadler.

18 THE COURT: Next is Ellen Nadler.

19 MS. NADLER: Yes, your Honor.

20 THE COURT: Mr. Lorell? Mr. Goldstein? All right.

21 Anybody else under participants? I will get to roll call later.

22 MR. LORELL: Your Honor, I'm sorry. I had spoken but I
23 didn't realize my phone was on mute. I am here and Nancy
24 Washington is with me.

25 THE COURT: All right. Anybody else under participants?

1 JUDGE DREIER: Judge, Bill Dreier. I don't know where you
2 would classify me.

3 THE COURT: Well, if you intend to speak or to listen --

4 JUDGE DREIER: If you allow screaming, it would be fine,
5 but I may be listening.

6 THE COURT: We're going to put you under roll call. Is
7 somebody by the name of Chase from Davis Polk?

8 MS. KATZ: It's Katz, your Honor, Sharon Katz, K-a-t-z.

9 THE COURT: I'm sorry. Mr. Harriss?

10 MR. HARRISS: Yes, your Honor.

11 THE COURT: Mr. Parker? Ms. Wills? Scoliard, is it?
12 Scoliard or St.Jeanos? Pasquale?

13 MR. PASQUALE: Yes, sir.

14 THE COURT: All right. Bayer?

15 MR. BAYER: Yes, your Honor.

16 THE COURT: Morales? Anybody else listening who's not
17 participating? All right. Is Mr. Bernick there?

18 MR. BERNICK: Yes, sir.

19 THE COURT: All right. Mr. Bernick, I believe that when
20 we parted at or about 10:15, there was going to be another
21 conference and you were going to advise the Court where you were.

22 MR. BERNICK: Yeah. I think in our other conference we
23 basically confirmed the schedule for the two tracks. We also
24 undertook to reach out once again to Professor McGovern, which I
25 have since done, and I notified him that he is slotted for the

1 first track on the second day after Mr. Eckstein, so, I think
2 when it comes to the schedule, we are in agreement that the
3 schedule will be as follows:

4 Track one would be on January the 5th, Mr. Gross. Track
5 two on January the 5th would be Mr. Brodsky, Judge Dreier and
6 then Mr. Case. Track one on the 6th would be Mr. Eckstein
7 followed by Professor McGovern, and track two would be Judge
8 Hamlin and then the last witness would be Mr. Keefe.

9 We had no further discussion regarding the duration of any
10 one of these depositions. We don't purport to reflect any
11 agreement as to how long any one deposition will last. We are
12 cognizant of your Honor's prior determination that the time limit
13 for any deposition is one day under the federal rules.

14 We also understand your Honor's determination from our
15 prior call to be that the depositions will be conducted in the
16 court house in New Jersey with your Honor being available to rule
17 on objections there.

18 We understand your Honor further has made arrangements for
19 one court reporter and the parties I guess are to make
20 arrangements for a second court reporter, and I think that pretty
21 much those are the parameters, the logistical parameters that I
22 think everybody has agreed to in connection with the depositions
23 on the 5th and on the 6th.

24 There have been further discussions regarding other
25 matters but maybe I'll just take a pause here and determine

1 whether I've reflected the interplay correctly.

2 MR. PARKER: Your Honor, as a housekeeping matter, I just
3 want to apologize. It's David Parker and I'm a listener. I
4 didn't get the proper password.

5 MS. WILLS: Also Joanne Wills, Jennifer Scoliard, we're
6 listeners, but I think we're waiting for our co-counsel, Chris
7 St. Jeanos, on behalf of D. K. Acquisitions that will be a
8 participant.

9 MR. ST. JEANOS: I'm on the line now.

10 MS. WILLS: Okay. We didn't get the number, either.

11 JUDGE DREIER: Again, Judge Dreier here. The scheduling
12 that I've just heard for the first time, and I hear of tracks,
13 does this mean that Mr. Gross is going to be deposed first,
14 then --

15 MR. BERNICK: I'm sorry. I apologize for not being clear,
16 Judge Dreier. We're going to have two tracks, which means we're
17 going to have two sequences of depositions, two different
18 locations both within the court house.

19 THE COURT: And by the way, they'll be in adjoining jury
20 rooms. We're going to use Judge Lifland's jury room and my jury
21 room.

22 MR. BERNICK: With respect to your deposition, Judge
23 Dreier, you're preceded by Mr. Brodsky. You would then go and
24 then Mr. Case will follow. Mr. Gross is being examined in a
25 separate room with the expectation that he'll last the day.

1 JUDGE DREIER: I also spoke to Judge Keefe and we both
2 understood that we were going to be on the 5th. Has anyone
3 contacted him? I believe he thought he was going to be on the
4 morning of the 5th, not on the 6th.

5 MR. BERNICK: Well, he has been set down for the 6th. We
6 didn't get -- we didn't have any indication --

7 JUDGE DREIER: Did you call? I mean, I had no call saying
8 as to my preferences, although I told a couple of people, and I'm
9 glad I am on the 5th, but perhaps someone should contact him. I
10 know he's in a mediation now at his office. You can break in.

11 THE COURT: Judge Dreier, would you clarify, when you said
12 you told a couple of people, that you did not discuss it with the
13 Court.

14 JUDGE DREIER: I have not spoken to you, Judge Wolin.
15 This was when I called to find out what kind of boxes and where
16 I, you know, who wants what when. I have not spoken to you or
17 anyone at your direction.

18 MR. BERNICK: I think, Charlie, you were going to reach
19 out to these other folks. Did you try to give Keefe a call?

20 MR. MONK: Yes, we did. We were told that he was
21 available either day, David.

22 JUDGE DREIER: I spoke to him this morning just to ask
23 what is he doing, how is he sending his materials in to New York
24 and such, and I assume you'll talk about that later. I think he
25 expects to be there on the 5th but someone might just touch base

1 with him. I don't believe people have.

2 MR. MONK: We will circulate this list and the approximate
3 times and the final version to everyone and we'll specifically
4 reach out for Judge Keefe and make sure that he knows that we're
5 looking for him.

6 JUDGE DREIER: Thank you. I'm sorry for interrupting.

7 MR. BERNICK: I also contacted Professor McGovern, who is
8 in the dark literally and figuratively on the West Coast, they
9 apparently lost electricity because of the storms out there, and
10 I told him that he's been scheduled for the 6th, and I didn't
11 solicit an agreement to that but he didn't voice any opposition
12 to that.

13 THE COURT: Mr. Bernick, would you do me a favor again
14 please. On the 5th, will you tell me who's on track one first?

15 MR. BERNICK: Yes. On the 5th, track one is Mr. Gross.

16 THE COURT: Okay.

17 MR. BERNICK: Track two is Brodsky, Dreier and Case.

18 THE COURT: Brodsky, Dreier and Case. Okay.

19 MR. BERNICK: On the 6th, track one is Eckstein and
20 McGovern.

21 THE COURT: Eckstein and McGovern.

22 MR. BERNICK: Track two is Hamlin, Keefe and then
23 obviously we have to confirm that with Judge Keefe.

24 THE COURT: All right.

25 MR. BERNICK: Now, I put it out and I guess I'll put it

1 out again. If anyone disagrees with my recitation of where we've
2 come out --

3 THE COURT: Anybody object? Let the record indicate no
4 one objected to the way it was stated by Mr. Bernick.

5 MR. BERNICK: That leaves some logistics and some issues
6 with respect to document production, and it may be what we should
7 do --

8 THE COURT: Can we finish depositions first.

9 MR. BERNICK: Yes.

10 MR. ROBBINS: Your Honor, this is Larry Robbins. I have
11 one small logistical question to raise which did come up last
12 Friday. As the Court may recall, I am in the Court of Appeals
13 for the federal circuit on the morning of the 6th. In order to
14 fulfill that obligation, which is long standing, if we could
15 begin Mr. Gross's deposition perhaps an hour earlier than the
16 ordinary time of 10:00, at 9:00.

17 It has been represented, I believe, by his counsel last
18 Friday that 9:00 would be feasible for Mr. Gross. I don't know
19 whether it is, however, physical for the court house or for the
20 court reporter, but if it were, it would enable me to finish Mr.
21 Gross's deposition and then return by Metroliner to Washington so
22 that I can be available in the Court of Appeals in the morning.

23 THE COURT: Mr. Robbins, we'll start all depositions at
24 9:00.

25 MR. ROBBINS: Thank you very much, your Honor.

1 THE COURT: And that will be for both days, both the 5th
2 and the 6th.

3 MR. ROBBINS: Thank you very much, your Honor.

4 THE COURT: You're welcome.

5 MR. BERNICK: With respect to document production, there
6 were two major things that have been discussed, and maybe so that
7 we can get one out of the way quickly, we should begin with it
8 and, that is, just logistics of the production of materials that
9 are being discovered.

10 We understand that the deadline for production of
11 documents to be January the 2nd. There has been some discussion
12 of how those documents would actually be produced, that is, where
13 documents would become available, and I have to tell you that my
14 eyes glazed over at this point in our conference call at this
15 point, so, maybe somebody else could recite what we had discussed
16 in terms of where the documents would be produced.

17 MR. MONK: Judge, this is Charlie Monk. We agreed that we
18 would actually have three sets to the respondents. One set would
19 come to my office in Baltimore, another set would go to New York,
20 and a third set would go to Mr. Bernick in Chicago. The set to
21 New York should go to Jane Parver's office.

22 MR. ORSECK: That's right. This is Gary Orseck, and we
23 received and agreed to that request and the movants, in turn,
24 have requested of the advisers and we'd like to request of all
25 parties who are responding to our document requests that three

1 sets of the responsive materials be sent to Mr. Trachtman's
2 office at Kramer Levin in New York.

3 THE COURT: All three?

4 MR. ORSECK: Yes, sir.

5 THE COURT: Okay.

6 MR. BERNICK: That's fine from the point of view of Grace
7 respondents. I would only urge that somebody reach out to
8 Professor McGovern. I think he's going to have a difficult time
9 with delivering three sets by Friday because he does not have the
10 staff to help in his -- I don't know what kind of documents he
11 has and how many he has, but I do know that he doesn't have
12 counsel, he hasn't told me he got counsel, and I know that
13 academically he probably doesn't have a staff of people to make
14 documents, so, all I guess I'm saying is that I don't know that
15 Professor McGovern is going to be able to deliver three sets, and
16 it might be worthwhile if you guys would agree that Professor
17 McGovern can deliver one set to Mr. Trachtman and maybe he can
18 make two copies.

19 MR. ORSECK: This is Gary Orseck again. We're happy to
20 discuss this with Mr. McGovern. None of us, I believe, on the
21 movants' side has been in contact with him at all and not even
22 sure how we would get a hold of him, but I'd be happy to have the
23 conversation with him.

24 MR. BERNICK: I'll give you two numbers. 202-744-6750,
25 that's his cell phone, and then his office phone at Duke is

1 911-137095 (inaudible). You might have better luck just leaving
2 a voice mail there. I don't want to be a go-between on his
3 document production obligation.

4 MR. ORSECK: I will call him directly.

5 MR. BERNICK: If there's nothing else there, then I think
6 the last thing that we talked about, your Honor --

7 THE COURT: Excuse me. One last matter. I don't know if
8 four sets is enough. If you're sitting down taking a deposition,
9 you've got counsel, each wants a copy of the document, you're
10 going to have to give one to the witness, the reporter may need a
11 copy of the document to follow. Have you given any thought to
12 that?

13 MR. BERNICK: I think what we've been talking about is
14 what gets produced. Anybody that shows up in a deposition and
15 wants to use documents as an exhibit, we'll have them cross that
16 bridge, that pretty -- it's the obligation of the attorney taking
17 the examination to carry the burden of making copies of documents
18 that they want to use as exhibits.

19 THE COURT: I just want to alert you in advance because
20 the Court will not have the facility to make documents as they
21 may be needed.

22 MR. DEVEREAUX: David, if I could interrupt, and following
23 on the Court's point on copies, I don't know if we reached
24 agreement on this the other day, maybe my eyes glazed over the
25 other day, I would have thought that given all the parties here,

1 that the most sensible way to do this would be to produce it to
2 some outfit probably centrally located in New York that was
3 charged with and given a list of e-mail addresses, was charged
4 then with circulating on that day the second PDS, because I for
5 one sitting out on the West Coast is worried about when I am
6 going to see a hard copy.

7 MR. BERNICK: Here's what I would suggest, Scott. It
8 seems to me that if we make that kind of arrangement, it just
9 takes more time. We then are subject to business of how the
10 delivery takes place. Why don't you simply make arrangements
11 with Mr. Trachtman, who I know from long experience beyond the
12 competence in such matters to get an expedited version of the
13 documents to you so that you've got everything that's been
14 produced as promptly as you can get it, and it may be that the
15 best way to do that is just through a courier service that puts
16 it on an airplane.

17 MR. ORSECK: I can do that and, obviously will do that
18 with my client. With all the other parties who are sort of
19 interested here, I wonder if that's going to be ultimately
20 efficient but unless they want to raise concerns, I'll do it that
21 way.

22 MR. SHIRE: Mike Shire for Judge Hamlin. We're sitting out
23 here in Cincinnati and I do have a concern about whether we're
24 going to get our hands on documents and, likewise, it's unclear
25 to me who would be producing documents.

1 MR. BERNICK: I think the whole idea is that's all you'd
2 have to produce --

3 MR. ORSECK: That's correct. The idea that I proposed is
4 that all documents produced by the advisers would be sent
5 straight to Mr. Trachtman and I had requested in an e-mail
6 yesterday copying an address list circulated by Mr. Abrams asking
7 that the production be made by overnight delivery with the
8 earliest possible delivery option so that we would receive the
9 documents on the morning of the 3rd.

10 MR. BERNICK: Mr. Trachtman would be then responsible for
11 making distributions to the entire list of people participating
12 in these proceedings. Is that right?

13 MS. NADLER: No.

14 MR. BERNICK: Well, then what would it be? If Trachtman
15 is supposed to be a focal point for distribution, it strikes me
16 as being a reasonable thing to do, not being Mr. Trachtman
17 myself, but we want to be most efficient about it, it does seem
18 to me then that the people who have got the most active interest
19 in the documents, because they're going to be conducting
20 depositions, have got to make special arrangements, but if
21 everybody is to have a record of what was produced, it does seem
22 to be the copies got to go out to a service at some point to get
23 distributed to everybody on the list.

24 MR. ORSECK: This is Gary Orseck again. If I spoke out of
25 turn on behalf of all the movants, I apologize. If there are

1 parties who wish to have production of documents from the
2 respondents made directly to them, then they should speak up. I
3 had agreed to Mr. Monk's request that we would produce documents
4 to the three locations he requested and I, in turn, asked for
5 production to be made in New York to Kramer Levin, but if
6 somebody else wants a set sent somewhere else, that's fine with
7 me.

8 MR. BERNICK: I guess, your Honor, maybe we have a bone of
9 contention here but under the rule, I don't know that there is
10 any obligation to serve multiple copies all over the country by
11 courier. The obligation is to make documents available, so,
12 there's already an accommodation by people sending copies to
13 different parts of the country and it seems to me that at some
14 point if everybody wants a copy, that can be undertaken on a
15 voluntary basis, but I certainly don't have an interest on behalf
16 of my clients in having multiple sets of copies delivered all
17 over the country. It just doesn't make any sense at all.

18 MR. ORSECK: I'm sorry, David.

19 MR. BERNICK: It seems to be sensible that there ought to
20 be -- the three sets being delivered ought to -- I mean, that's a
21 good compromise. If people want to make further requests of the
22 documents from people that have gotten one of those three sets,
23 that's appropriate. If people want to make further requests of
24 documents from the people from the so-called track set, that's
25 appropriate, but the obligation that's being undertaken here on a

1 voluntary basis is confined to production of Mr. Trachtman on the
2 one hand and on the other to the three locations around the
3 country.

4 MR. DEVEREAUX: Well, if Mr. Trachtman doesn't want to --

5 THE COURT: Excuse me. You have to identify yourself for
6 the record.

7 MR. DEVEREAUX: I'm sorry. I thought I did. Scott
8 Devereaux.

9 THE COURT: All right, Mr. Devereaux. You have to keep
10 doing it because we don't know who you are.

11 MR. DEVEREAUX: If Mr. Trachtman doesn't want to take on
12 that obligation to be a clearing house or one of the other three
13 groups that are receiving documents from the movants don't want
14 to be the clearing house for everyone, then it does seem to be,
15 while it may be right on the rule, David, then what we need to do
16 is maybe come to a compromise that sends documents, a set of
17 documents to some service that is paid for and tasked with
18 distributing to everyone.

19 MR. BERNICK: Well --

20 MR. SHIRE: This is Mike Shire. May I inquire the three
21 locations around the country where documents are being produced?

22 MR. BERNICK: It was Chicago and my firm was one. Then I
23 think there was another in New York, and then the third -- what
24 was the third one?

25 MR. MONK: Jane Parver's firm is Kaye Scholer, and the

1 third one is Saul Ewing in Baltimore.

2 MR. BERNICK: Thank you.

3 JUDGE DREIER: Sorry to interrupt again. Judge Dreier. I
4 have a letter from Gary Orseck to deliver documents to Jeffrey
5 Trachtman. I hear now they want three sets.

6 Also, when I spoke to Mr. Trachtman earlier, he said he
7 thought that there could be some limited production. I spent the
8 better part of last weekend going through everything and
9 assembling four boxes of documents, most of which related to
10 deciding individual motions on W.R. Grace.

11 MR. BERNICK: Which we're going to -- that's the second
12 topic that we're going to take up here, which is our agreement,
13 to the extent we can reach one, on reducing the scope of
14 production by eliminating categories of documents, and I think we
15 are in agreement already that, Judge Dreier, that discovery with
16 respect to your activities as the special master on discovery
17 issues is not necessary.

18 JUDGE DREIER: That takes all but one box. On the box
19 relating to the investors -- asbestos advisory committee, most of
20 that box is billing records which were filed with the Court which
21 I understand you don't want because it's already been -- you
22 already have them; and ,secondly, articles or cases that were
23 circulated, published articles, published cases.

24 In addition, I think I have about a dozen pages of my
25 notes of those meetings. Do you really want me to send three

1 copies of published cases and articles to everybody or to even
2 just to file with Mr. Trachtman?

3 MR. ORSECK: Judge Dreier, this is Gary Orseck, and one
4 set of your responsive documents will be sufficient and I'll
5 speak for Mr. Trachtman and say that we will make whatever copies
6 in New York we need.

7 JUDGE DREIER: When you say responsive, the first document
8 request was all documents that reflect, refer to or relate to
9 anything done with the five asbestos cases, and then later it
10 says or adviser to Judge Wolin. Well, you know, read broadly, it
11 includes every piece of paper in this last file, most of which I
12 am reasonably sure none of you want.

13 I can understand you wanting my notes, but to go and copy,
14 you know, published cases that most of you probably have appeared
15 in, much less have been familiar with, and articles that were in
16 either Trial magazine or from other things that may just come up
17 and might have just been discussed, those are all interesting to
18 any of you.

19 MR. ORSECK: I think we will get to the question next of
20 the substance of the production.

21 THE COURT: Who's speaking please?

22 MR. ORSECK: And any agreements as to carve out of
23 materials that need not be produced, but I think we should just
24 group on the logistics of the productions themselves and what I
25 said, that at least on behalf of Kensington and Springfield, one

1 set of materials will be sufficient. By the way --

2 THE COURT: Excuse me once again. Whenever you speak, you
3 have to identify yourself for the record. I thought that was Mr.
4 Orseck. Is that correct?

5 MR. ORSECK: Yes, it was, your Honor. I apologize. I
6 forgot.

7 MR. BERNICK: This is David Bernick. Let me make a
8 proposal with respect to the production to Mr. Trachtman. Why
9 don't we have an arrangement whereby anybody who wants a copy of
10 the documents produced to Mr. Trachtman will simply notify him
11 and maybe, Jeff, if you could then send them out to a vendor with
12 forwarding instructions per the requests that are made of you, so
13 that effectively the document flow would be the documents that
14 are being produced in response to requests made by the
15 respondents to the motions for recusal.

16 Three copies will be sent to Mr. Trachtman so far with the
17 exception of Judge Dreier. Mr. Trachtman will then have those
18 sets of documents and anybody who wants a copy of those documents
19 will notify Mr. Trachtman by, let's say, noon on the 2nd, and
20 then Mr. Trachtman will take that list of people who want a copy
21 and will make arrangements for a local vendor to copy the
22 documents and forward them on by the fastest possible means to
23 the people that made the request.

24 MS. NADLER: This is Ellen Nadler. I believe that's an
25 unreasonable burden to put on us and I don't understand what good

1 it's going to do anybody else when they'll wind up getting their
2 sets on Monday when the deposition starts.

3 I think within the movants' constituency we'll make our
4 own arrangements and if there is a concern that the respondent
5 constituencies want the documents, then there should be an
6 arrangement whereby one set gets delivered to Saul Ewing or one
7 of the other firms on the other side and they undertake this
8 responsibility.

9 MR. BERNICK: I didn't realize it was so incredibly
10 burdensome for Mr. Trachtman's office to make these arrangements.
11 I didn't hear Mr. Trachtman make an objection.

12 MR. TRACHTMAN: It's one office, David, and the issue is
13 just doing it in the time frame for people get them in time.
14 You're just adding another layer of production. We ought to be
15 responsible for getting things out to people on our side and
16 having served them on you, you ought to circulate documents
17 served on you to your side.

18 MR. BERNICK: It's not quite that way because the
19 documents, you're getting one set of all the documents that are
20 being produced on location. You're the only one that's getting
21 them.

22 MS. NADLER: But there's nothing written in stone about
23 that. If you need one set on your side, then people should send
24 a set to Saul Ewing.

25 MR. BERNICK: That's fine. We can then have the

1 arrangement and that three copies from each of these advisers
2 make their way to Mr. Trachtman. We can tell all the advisers
3 that three copies should then be sent to Mr. Monk, which then
4 poses a greater burden on the advisers. I was seeking to
5 alleviate the burden on the advisers.

6 MR. MONK: Your Honor, this is Charles Monk. May I make a
7 proposal?

8 THE COURT: Sure.

9 MR. MONK: We will undertake to locate a copy service that
10 could receive directly from everyone a set of everything that's
11 being produced and turn around, image those documents, send them
12 by e-mail to everyone and send a hard copy by the best possible
13 means.

14 What I would propose to do is locate that copy service and
15 e-mail everyone on this distribution list with that information.
16 You can then -- individual parties can then decide whether they
17 want to purchase copies of those materials based upon their level
18 of interest.

19 MR. BERNICK: Well, it does make -- it does centralize
20 everything but it then takes more time.

21 MR. MONK: I still believe that we have to have the three
22 copies.

23 THE COURT: Who's speaking now?

24 MR. MONK: I'm sorry, your Honor. Charles Monk again.
25 Just to continue my proposal, I think there really are two sets

1 of needs here. One level of need is for people who are going to
2 be taking the depositions, we will need the documents on the 2nd
3 with no exceptions because we'll need the weekend to prepare for
4 the depositions.

5 There's another set of people who have a great deal of
6 interest in these matters and will want an archival set of all
7 the records so they'll have an opportunity to review them and
8 understand what's developed in the depositions, and I would
9 propose to accommodate those two needs by having the sets sent as
10 we had originally described, the three sets, one in New York, one
11 to Baltimore, one to Chicago on the respondents' side and as Mr.
12 Orseck suggested earlier, the three sets then to Mr. Trachtman on
13 the proponents' side and a copy, one additional copy sent to the
14 copy service so that everybody has a copy of everything available
15 to them.

16 MR. DEVEREAUX: Charlie, in response to that, if we're
17 going to meet that objective to make sure the parties who are
18 going to be actively participating in these depositions, I have
19 asked two sets be sent to Mr. Trachtman and one set be sent to me
20 on the West Coast.

21 MR. MONK: That's fine with me. It's Mr. Monk. Sorry.

22 THE COURT: Anybody else want to be heard?

23 MR. ORSECK: That's fine with me. This is Mr. Orseck.

24 MR. BERNICK: I would still prefer to have Mr. Trachtman
25 send out a set to a local vendor for purposes of distribution so

1 that we don't impose the burden on the advisers of coordinating.

2 All they have to worry about is getting a set in Mr. Trachtman's

3 hands and all he has to do is pick up the telephone and call a

4 vendor and have them make these arrangements. Otherwise, you're

5 going to have all of the five advisers and anybody else who's

6 producing documents in response to movants' request all sending

7 an additional set to some predetermined vendor and I think that

8 increases the chances that there will be problems.

9 MR. ORSECK: This is Mr. Orseck. We've taken up a lot of

10 time with this but we have agreed to send sets to three different

11 locations at the respondents' convenience and I think Mr.

12 Devereaux is simply requesting that one set be sent to the West

13 Coast because if he needs to get it through Mr. Trachtman's

14 office, it will take an additional day to do that and he will not

15 have sufficient time to prepare for the depositions.

16 MR. BERNICK: I'm not speaking to that at all. That's

17 your arrangement, that's fine. I'm talking about what happens

18 with the documents that are being produced to Mr. Trachtman and

19 where other people want copy sets of those documents because

20 there are more -- there are many people who are party to this

21 process right now, and all I'm saying is that I think it's very

22 simple for one of the sets that's being sent to Mr. Trachtman to

23 be copied and sent out to a copying service and they then take

24 charge of getting distributed around the country rather than

25 having the advisers have to deal with that copy service. Mr.

1 Trachtman, do you have a problem with that?

2 MR. ORSECK: I think Mr. Monk has already proposed a more
3 centralized way and it makes more sense to the debtor and you
4 know --

5 MR. BERNICK: I think the idea that this is a burden on
6 you is I don't think credible but --

7 MR. TRACHTMAN: It's a burden and delay. I'm not sure.

8 MR. BERNICK: It's not a delay that affects you at all.
9 All you've got to do is put them in the copy center and you wash
10 your hands of it.

11 MR. TRACHTMAN: I really think we can work this out
12 without taking up any more of the Court's time. I think we can
13 just think about this and speak in a smaller group and we'll work
14 out the logistics.

15 MR. BERNICK: The problem is, Jeff, the real problem is
16 getting word to the advisers on what they're supposed to do. I
17 don't have a problem trying to work it out among ourselves but
18 we've got counsel for one of the advisers, we've got another
19 adviser on the telephone. We've got to get clear direction to
20 them about what they're supposed to do.

21 MR. DEVEREAUX: Scott Devereaux again. Mr. Monk said he
22 would circulate an e-mail to all parties, including advisers or
23 proposed people who produce documents, letting them know exactly
24 along the line of this proposal where and when to produce
25 documents, and it seems to me all this discussion at this point

1 is whether or not one additional set of documents goes direct to
2 a copy service, Mr. Monk's proposal, or whether one less copy set
3 goes to -- all just going to Mr. Trachtman or to me and Mr.
4 Trachtman forwards them on, and I don't think it's frankly worth
5 the time to argue about it and we'll make it much quicker, might
6 make it as much as a day quicker to have the advisers send them
7 directly to the copy service.

8 THE COURT: I'm sitting and listening. Is there a
9 proposal that anybody wants the Court to rule on because there
10 have been many proposals discussed?

11 MR. BERNICK: My proposal I think is straightforward,
12 which is that all of the movants produce their documents, the
13 documents being requested of the movants, those documents be
14 circulated, as I think we've already agreed, to those three
15 locations, and then the respondents will get additional copies by
16 making requests of one of those three recipients.

17 With respect to the documents that are being produced by
18 the respondents, including and/or the advisers, that those
19 documents be delivered to Mr. Trachtman, three sets of those
20 documents be delivered to Mr. Trachtman, and if Mr. Trachtman
21 makes arrangements with a local vendor to circulate them further
22 to anybody who wants them and that will discharge his obligation,
23 he's only got to give one set to the local vendor rather than
24 imposing the burden on the advisers or separately communicating
25 with them. That's my proposal.

1 THE COURT: Is there an objection to that?

2 MR. DEVEREAUX: Your Honor, I would object to that in that
3 it ensures that I will not get those documents on the 2nd. I'd
4 get them as early, depending on the copy service's response, I
5 get them as earliest on the 3rd, and then instead I would propose
6 what Mr. Monk had proposed and, that is, that the production by
7 the movants be made to the three centers around the country as
8 Mr. Bernick had outlined and that an additional production be
9 made to a centralized copy service at the same time.

10 Consequently, in addition, that the documents be produced
11 by the respondents, two sets to Mr. Trachtman, one set to me at
12 Palo Alto and one set to the same copy service and that all
13 additional parties who want or need a copy of the documents get
14 them from that copy service.

15 THE COURT: So, then you're saying that respondents have
16 to produce four copies, one copy --

17 MR. DEVEREAUX: Yes. It would in effect have an
18 additional one copy, my proposal would, your Honor.

19 MR. BERNICK: Just to be clear, Scott, I thought you were
20 agreeable to making arrangements with Mr. Trachtman to get your
21 set directly from him.

22 MR. DEVEREAUX: No. I think this discussion has been a
23 lot of different places but I think where it most sensibly and
24 last was, I was going to have a copy of the three sets going to
25 Mr. Trachtman, instead two would go to Mr. Trachtman and one

1 would come to me.

2 MR. BERNICK: So, you're taken care of.

3 THE COURT: Well, let me ask this question.

4 MR. DEVEREAUX: Not under your proposal, David.

5 THE COURT: Let me ask this question. I don't know if it
6 helps. Whatever you agree on, that will be fine by me. What if
7 everybody who was going to produce documents sent those documents
8 to the centralized services to produce as many copies as
9 requested?

10 MR. BERNICK: We could do that. It's just that I think
11 there's a desire on the part of people who are going to have to
12 take depositions on Monday to get the very first set that's being
13 produced so they don't have to wait for the copy service to turn
14 around to process all these documents and turn around and send
15 them off. That's why I think that Scott was focused on getting
16 as early a set as he could so that he could use the documents
17 that are being produced, but I think the same thing applied with
18 respect to the documents that are being produced by the movants.
19 I know that Mr. Monk wants to get one of the very first sets so
20 that he can prepare for the deposition on Monday. Assume you're
21 working with a copy service, it's going to take a little more
22 time and I think the distinction that was made originally was we
23 want to get the first set of documents in the hands of people
24 that really need them in order to take depositions on Monday, and
25 the problem that we are wrestling with under these proposals is

1 how do other interested parties get a copy of the documents as
2 well, and under one proposal, the way they can get copies of the
3 documents is that the people who are producing them, produce them
4 direct to the outside vendor.

5 Under the other proposal, which is my proposal, they get
6 -- all those documents get produced to Mr. Trachtman and all that
7 Mr. Trachtman does is to take one copy set and give them to the
8 outside vendor.

9 THE COURT: How does that accommodate Mr. Devereaux?

10 MR. BERNICK: Mr. Devereaux is going to -- I mean, Mr.
11 Devereaux, under my proposal, would simply get his one of the
12 three copies that was going out. Two would go to Trachtman and
13 one go to Devereaux, so, he's going to get them in the first
14 instance anyhow.

15 THE COURT: I don't know if overnight delivery to the
16 coast means overnight.

17 MR. BERNICK: It does.

18 THE COURT: Mr. Devereaux, you can speak to that more than
19 I can.

20 MR. DEVEREAUX: There are courier services who will put it
21 on the next airplane out. The answer, your Honor, is if David's
22 proposal does encompass at the same time two sets or whatever it
23 is goes to Trachtman, a set comes out to me, then I think that
24 I've got what I need on behalf of my client.

25 What's the most efficient way for distributing as David

1 describes it, getting the documents to the other interested
2 parties, I said more than I need to say probably on that.

3 THE COURT: All right. Anybody else want to be heard?

4 The Court will order that the production of the movants be sent
5 to the three locations that there seems to be no argument about,
6 that would be Baltimore, New York and Chicago, and the movants or
7 the respondents -- excuse me -- will send two to Mr. Trachtman
8 and one to Mr. Devereaux in Palo Alto, and as far as other
9 persons who may be interested, I'm going to leave it to counsel
10 to work that out for those individuals. I'm not going to order
11 it.

12 MR. ORSECK: Your Honor, this is Gary Orseck. The
13 remaining issue that we had discussed among ourselves and reached
14 some modest agreement on and some disagreement on some other
15 issues relates to the production and logging of privileged
16 documents, and I think I can summarize where we are on that
17 issue, if your Honor wishes to hear that next.

18 THE COURT: Sure. Go ahead, Mr. Orseck.

19 MR. ORSECK: Thank you. We had in our call on Friday
20 proposed a means to address, among other things, the respondents'
21 concern that the privilege log process was going to be unduly
22 onerous for them and what we had proposed was that both sides
23 would be absolved of logging privileged materials that are, in
24 essence, documents in connection with the litigation of the
25 recusal motion, such as drafts of briefs and work product that

1 has gone into the production of briefs and preparation for
2 argument and so on.

3 For our part, we had asked specifically that the
4 respondents would nonetheless be required to log any materials as
5 to which they claim privilege that constitute communications with
6 the advisers or with the Court, and that other than those
7 categories of materials which the respondents would have to
8 provide a log, they wouldn't have to log the materials that I
9 thought I understood Mr. Inselbuch and Mr. Bernick claiming would
10 be most voluminous, and for our part we would not provide
11 privilege logs at all for the same materials but would certainly
12 for the period after September 24th and through the cutoff date
13 identified by the Court would either produce or put in a -- put
14 log materials that discuss knowledge by the respondents -- I'm
15 sorry -- by the movants of the alleged conflict prior to
16 September 24th.

17 So, with those carve-outs, what we had proposed I think is
18 a great reduction in the amount of privilege logging that would
19 have to go on. There were various, your Honor, objections and
20 exceptions requested by several other parties during the call and
21 since the call as to additional materials that they would like to
22 have logged or materials that they don't wish to produce or don't
23 wish to log, and what I think I can fairly say is the movants'
24 position at this point is that we are amenable, if no further
25 agreement can be reached, to putting all privileged materials in

1 a privilege log. I believe I speak for all the movants in that
2 regard, and we think that should be done in parallel so that the
3 respondents would have the same obligation.

4 We think that to the extent there's disagreement, this
5 proposal will result in the greatest transparency, the greatest
6 amount of information which will be put on the record, which we
7 think is consistent with what the Third Circuit has in mind.

8 THE COURT: Mr. Orseck, has anybody estimated how many
9 privileged documents we're talking about, let's say, on the
10 movants' side?

11 MR. ORSECK: Your Honor, as far as Elliott, Kensington and
12 Springfield are concerned, although I don't have my hands on the
13 document, I understand it to be a manageable number that can be
14 logged within the remaining time.

15 MR. BERNICK: But that's not really -- the movants also
16 include, by movants, we're really talking about documents that
17 are being sought of the movants or of people who are witnesses
18 that are related to the movants.

19 For example, the discovery of Mr. Case, Mr. Eckstein, I
20 think we'd have to, you'd have to outline what the volume of
21 those is as well.

22 MR. ORSECK: Well -- this is Gary Orseck again. They can
23 speak for themselves, but I've not heard an objection by any of
24 those parties to creating complete privilege logs.

25 MS. NADLER: Your Honor, this is Miss Nadler. The number

1 of documents that we would have to put on a privilege log from
2 the Kramer Levin production, while we don't have an exact figure
3 yet, is also manageable and will not pose a problem.

4 MS. KATZ: Sharon Katz, your Honor. This is Sharon Katz.
5 We have the same -- I don't know the exact number but I am
6 confident it will be manageable.

7 MR. BERNICK: Your Honor, this is David Bernick. It is
8 very difficult to listen to this in the first instance because I
9 think that Mr. Orseck obviously stated accurately what his
10 position is and perhaps the position of others who are on the
11 movants' side, but there are a number of moving parts that I
12 think are encompassed by his statements that may not be totally
13 clear to the Court, and let me try to break them out a little bit
14 so that you can see what the landscape is maybe a little bit more
15 clear. Maybe it's not a problem. Maybe I'm over-estimating it.

16 What is the first thing that we took up was the outright
17 exclusion of certain categories of documents from discovery. For
18 example, Judge Dreier's service as special master on discovery
19 issues in connection with the Sealed Air litigation, the Grace
20 case, I think we've all agreed that those are not really relevant
21 to the matters that are now before the Court and don't have to be
22 produced.

23 MR. MONK: David, Charles Monk, and that would include the
24 limited assignment that Judge Dreier had in the Owens Corning
25 case.

1 JUDGE DREIER: It was a single matter, single motion made.

2 MR. MONK: That's correct.

3 MR. BERNICK: I think we're all in agreement and if we're
4 not in agreement on that, then we ought to hear the objection. I
5 don't hear objections, so, that was the first proposal that was
6 made, and that obviously starts to reduce the logging burden
7 significantly.

8 Mr. Dreier then -- or Judge Dreier then made a further
9 proposal saying what do you really want these documents for that
10 have already been filed of record with the court, and I don't
11 take it that anybody believes that anybody's got to produce
12 documents that are already filed of record with the court. Is
13 there any disagreement with that?

14 MR. ORSECK: This is Gary Orseck. I believe excluded from
15 the definition of responsive documents are pleadings that are
16 filed with the court and distributed to the parties.

17 MR. BERNICK: I just don't want to get involved where a
18 pleading is not a pleading but something that was filed of record
19 with the court. I don't think we've got a problem with that.
20 That helps Judge Dreier.

21 THE COURT: Mr. Bernick, before you move on, Judge Dreier
22 indicated that he had sent potentially to others, maybe even
23 including the Court, case digests, articles. Those would not be
24 documents filed of record.

25 MR. BERNICK: I was going to get to those. I think that's

1 right, that's a separate category, and as I heard Mr. Orseck's
2 reaction to that, it was, well, just give us one copy of those.
3 Again, you know, that's his business, Judge Dreier's business. I
4 can't imagine why those are at all responsive. I don't know that
5 that problem also affects the other advisers.

6 JUDGE DREIER: Judge Dreier here. They probably have
7 copies of these and if it affects them, I just -- for example, I
8 found this article here from the New York Times, the business
9 section, Surge in Asbestos Suits by Healthy Plaintiffs. The next
10 is American Thoracic Society article on respiratory diseases. I
11 mean, those are, you know, they're not -- they were not filed, I
12 assume, but they were circulated, but they're articles that
13 you're well familiar with, I'm sure all of you.

14 MR. BERNICK: Does anybody really want that stuff?

15 MR. ORSECK: Yes, we do. This is Gary Orseck, and it may
16 be that some people are familiar with certain items, other people
17 are not familiar with those items and I don't see that there's
18 any way that we can define a category of otherwise responsive
19 materials without seeing them or in a vacuum and simply say that
20 there are categories that needn't be produced.

21 MR. BERNICK: It's very simple. Published articles or
22 cases. What's the magic about it?

23 MR. DEVEREAUX: Scott Devereaux, and I do think it is
24 germane and relevant to know what it is that the advisers are
25 sitting and learning in their research rather than trying to get

1 into this definitional issue that it just be produced.

2 MR. BERNICK: That's the issue then, your Honor. It seems
3 to be that actually cuts exactly the other way because everybody
4 knows that there are extra-judicial matters that everybody has
5 contact with because they read the newspapers. Asbestos is
6 highly controversial. That's a separate category. I don't have
7 a view on it because it doesn't affect me.

8 JUDGE DREIER: Judge Dreier. May I suggest the title and
9 the source of the article or, look, I'll start our copying
10 department working on these. Do you want these all Bate stamped
11 in addition? I mean, this is just -- gentlemen, the only one I
12 very, very briefly spoke to is Judge Keefe to say how is he
13 sending these boxes. I've spoken with nobody else, but this is
14 oppressive but, of course, I will comply with any court order
15 that's there, but do you want these to be Bate stamped, these
16 articles, and just -- I'll box them.

17 MR. ROBBINS: Larry Robbins. Judge, this is Larry
18 Robbins. Look, it may very well be sufficient if you're finding
19 that it is oppressive and that your facilities are simply too
20 burdensome, it may be entirely sufficient, assuming that they are
21 simply copies of publicly available cases and articles, contain
22 no other interlineations, for example, to just provide, you know,
23 a list of what they are in a way that would allow us to obtain
24 sources, if it truly is overwhelming and, obviously, you know
25 better, they're sitting in front of you.

1 JUDGE DREIER: It's all in one box. I will be happy to
2 bring the box to the deposition and I'll give you the titles in
3 advance if you want. I just -- it's the copying logistics of
4 copying them and sending.

5 MR. ROBBINS: Judge, that sounds just fine to me if you
6 give us the list in advance and bring the boxes with you. I
7 mean, obviously, I can only speak for the folks in the room with
8 me now, but for Kensington's purposes, I am comfortable with that
9 arrangement and do not think you need to do more than that.

10 If someone else has a different view, they should speak up
11 now. Otherwise, I'm comfortable with what you just said.

12 MR. TRACHTMAN: This is Mr. Trachtman. I have one small
13 amendment which is if you could also copy any transmittal letters
14 or other correspondence that suggests as to whom this material
15 came from or was circulated to.

16 JUDGE DREIER: If I have them, I will. Some of them may
17 have been passed out at meetings. People might have brought a
18 few copies and given it to one or two people there. This is all
19 years ago, but I will look through my correspondence file after
20 pulling the W.R. Grace stuff out of there and there probably are
21 a few transmittal letters, you're welcome to those and you're
22 welcome, of course, to my notes of the meetings.

23 MR. BERNICK: Than can we try to capture this as a
24 proposition which is that the advisers can bring to their
25 depositions published articles and published studies that are in

1 their files without providing advance copies.

2 MR. DEVEREAUX: Scott Devereaux. With the two amendments
3 that, one, they provide a list of what those were on the 2nd,
4 and, two, if there's any transmittal letters or interlineated
5 documents, that those would be provided separately. That's
6 agreeable to me.

7 MR. MANCINO: Your Honor, this is Rich Mancino and I
8 wasn't present at the beginning of the phone call which I
9 apologize but I'm here now. I think doing it that way is just
10 going to be even more burdensome and I would propose that these
11 documents be sent to a copy service where they could be copied
12 and Bates numbered and produced.

13 MR. BERNICK: I guess you have it there, Judge Wolin, with
14 respect to this category.

15 THE COURT: I'm prepared to rule. Anybody else want to be
16 heard? All right. All persons who, I guess it's mainly
17 advisers, who have a list of -- who have cases or articles may
18 list them and bring the box with them to the deposition without
19 having to reproduce them at this time, so, Mr. Mancino, I reject
20 your suggestions. You may move on.

21 MR. DEVEREAUX: Your Honor, Scott Devereaux. Can I ask
22 for one clarification. When you say list them, do you mean
23 provide a list to the parties as part of discovery?

24 THE COURT: That's correct, as well as the transmittal
25 letters that you asked for.

1 MR. DEVEREAUX: Thank you, your Honor.

2 THE COURT: You're welcome.

3 MR. BERNICK: We then got to a somewhat broader
4 proposition and there were two kinds of -- two additional
5 propositions that were advanced. One was the proposition that
6 Mr. Orseck described and the essence of it I think was proposed
7 in good faith and it was designed to reduce the logging burden
8 and that was to establish kind of a cutoff beyond which you
9 didn't have to log documents.

10 In thinking, the concept behind the proposal was
11 straightforward, which was as of the time that the recusal
12 motions were filed, obviously, there would be a tremendous amount
13 of documentation that was both privileged and not highly relevant
14 because it was lawyers reacting to the recusal motions, but I
15 think how to respond, so, I think the concept was that the date
16 on which the motions were filed would constitute a cutoff for
17 logging purposes, the exception being, and it was differently
18 stated I think in all candor than the way it has been stated now,
19 is that the logging requirement would still apply to
20 communications with the advisers and to communications with the
21 Court, ex parte communications with the Court, and the difficulty
22 with that was that the discovery that's being proposed by the
23 respondents of Mr. Eckstein, they don't believe that they should
24 be subjected to a cutoff for what appears at least to be for, my
25 client, being for good reason, which is that Mr. Eckstein decided

1 to submit an affidavit and in the affidavit he recited activities
2 that he had undertaken in response to the recusal motion, so that
3 Mr. Eckstein has placed at issue his own post motion activities
4 and to the extent that he's done that, there now has to be the
5 opportunity to conduct discovery with regard to that affidavit
6 and that inevitably is going to be discovered as focused after
7 this cutoff of these recusal motions.

8 MR. TRACHTMAN: David, if I can interrupt you, we're
9 saying we're going to do a privilege log without a date cutoff.
10 I don't know why you're revisiting this.

11 MR. BERNICK: If you're going to do a privilege log
12 without a date cutoff, what is the essence of the proposal with
13 respect to the cutoff?

14 MS. NADLER: I think Mr. Orseck said on reconsideration
15 and in light of the fact that the privilege logs were not going
16 to involve that many documents.

17 MR. BERNICK: That wasn't clear, because Mr. Orseck
18 started by saying that they had made a proposal and I never heard
19 him saying they're withdrawing the proposal. If the proposal is
20 withdrawn, it's withdrawn.

21 MR. ORSECK: This is Gary Orseck. If I wasn't clear, let
22 me be clear. I had attempted to give his Honor some background
23 as to the back-and-forth about attempting to limit the creation
24 of privilege logs for two reasons; number one, that we ran into
25 significant objections by various parties on the other side and,

1 second, because as events have played out, it doesn't appear that
2 the burden of creating privilege logs will be all that onerous in
3 the first place, and there are -- I think our proposal is that we
4 avoid a lengthy argument about what gets carved out and what
5 doesn't and simply agree to provide privilege logs to one another
6 that capture materials that are being withheld on those grounds.

7 THE COURT: Mr. Orseck, let me interrupt for a moment. In
8 one of my filings with the Circuit Court of Appeals, I waived any
9 judicial privilege as to any communications with my advisers. I
10 don't know if that helps you or not.

11 MR. BERNICK: I think that this is really designed to
12 alleviate potential burden that the law firms have who are
13 responding to this --

14 THE COURT: Okay.

15 MR. BERNICK: -- where the law firms would have to log
16 significant documents that were prepared in connection with the
17 recusal motion, so, and that would be -- that would not be
18 affected by your Honor's waiver. That really implicates the
19 privileges that apply to the law firms and their clients.

20 THE COURT: Okay. I understand.

21 MR. BERNICK: I don't know to what extent at this point, I
22 don't know at least with respect to my law firm that there are
23 responsive documents that post date the filing of the motion for
24 recusal other than those, the original motion for recusal. I
25 really can't say that there's a particular burden for my firm

1 associated with having to log documents that are after the motion
2 to recuse.

3 MR. ORSECK: This is Gary Orseck, and excuse me for
4 interrupting if I did. I think we have agreement on this issue
5 and we can put the matter to rest. If Mr. Bernick has no
6 objection, I haven't heard any other objections to the creation
7 of privileged logs without a cutoff date.

8 MR. BERNICK: No, I lodged a more general -- let's just go
9 back. You proposed the cutoff for purposes of reducing the
10 burden that's associated with logging and, as you remember from
11 that discussion, I was fairly neutral on that. I thought it was
12 a good idea, but if it didn't really -- I didn't really voice an
13 independent view with respect to that.

14 I have a more general problem which is the problem of
15 producing a log to begin with and the reason why I have that
16 objection is the potential volume of documents that we're talking
17 about in the little time that we have, that burden is affected by
18 what the scope of the production is much more than it is by your
19 proposed cutoff, and that's why it was very important to me to
20 have you undertake what you were interested in Judge Dreier's
21 materials or his activities in connection with the discovery of
22 special masters because that affects the scope of the burden,
23 so --

24 MR. ORSECK: I believe we have agreement on that as well.

25 MR. BERNICK: That's correct. All I'm saying is the

1 cutoff doesn't really affect the broader proposition, so, far as
2 I'm concerned. What does affect the logging beyond what we've
3 already discussed is the second issue that we haven't discussed
4 at all, which is whether this production ought to include
5 materials relating to the activities of the advisers when they
6 have been engaged as mediators, and that does very much affect
7 the burden of this process so far as my client, my firm is
8 concerned, I should say more precisely so far as my firm is
9 concerned, and the issue there, Judge Wolin, is very
10 straightforward.

11 We know that both Professor McGovern and Mr. Gross had
12 acted as mediators. They've acted as mediators in connection
13 with the Sealed Air litigation and apparently they've also acted
14 as mediators in connection with the kind of resolve issues as
15 between the banks and the tort claimants in the Owens Corning
16 cases and --

17 THE COURT: I don't think that's accurate. It was
18 McGovern and the bankruptcy judge. Gross was not appointed to
19 mediate in Owens Corning.

20 MR. BERNICK: In the Grace case it is true.

21 THE COURT: It's Judge Fitzgerald and McGovern. She was
22 the settlement judge and McGovern was the mediator. Gross had no
23 official role.

24 MR. BERNICK: Then with respect to the Grace case,
25 McGovern and I think also Gross, although I'm not positive, were

1 engaged in discussions that were not only the obligation of Grace
2 to conduct as the debtor but also were directed by Judge
3 Fitzgerald, discussions about how to resolve the entirety of the
4 case, and it is my -- it is my and my client's position that
5 discussions of settlement, that is, discussions that took place
6 expressly and for the purpose of settlement, are not discoverable
7 and we are not waiving any privilege that applies to that. And
8 it seems to me that given the shortness of time that we have to
9 get all this discovery done, for us to have to go through files,
10 search for discussions of that nature and deal with that, I don't
11 think is appropriate and that does affect our logging issue.

12 You know, it seems to me that the activities that these
13 folks engaged in as mediators or settlement facilitators to be
14 off limits. That is the significant part of this discovery
15 process. We are not able to reach agreement on this subject.

16 THE COURT: Well, you know, the other day there was a
17 demand for document production of Sealed Air and Combustion
18 Engineering and I ruled then that there would be no document
19 production pertaining to those cases.

20 MR. ST. JEANOS: Your Honor, Chris St. Jeanos from
21 Willkie, Farr. If I recall correctly, it was there was to be no
22 discovery related to Combustion Engineering and that was it.

23 THE COURT: No. Mr. Trachtman wanted a lot of documents
24 pertaining to Sealed Air and I denied his request.

25 MR. MANCINO: Your Honor, Rich Mancino. Our understanding

1 with that was still within the scope of discovery.

2 THE COURT: That's my recollection.

3 MR. MANCINO: And indeed, it's been an issue of contention
4 as between the movants on my side and W.R. Grace opposing the
5 motion that was originally filed and before the Third Circuit as
6 to the significance of Mr. Gross's role in Sealed Air, and we
7 think that that should be a topic of disclosure here.

8 MR. BERNICK: I don't believe there was ever any such
9 request.

10 MR. ST. JEANOS: We're looking at what Mr. Gross and Mr.
11 Hamlin did and what their roles are.

12 MR. BERNICK: There's never been any allegation of
13 improper contacts or improper discussion with respect to Gross or
14 Hamlin in connection with Sealed Air. No one has ever made that
15 allegation.

16 MR. MANCINO: I made the argument last week that in our
17 view at least and Mr. Bernick is free to argue the merits of this
18 on the 16th, that Mr. Gross's role in connection with the Sealed
19 Air settlement does bear on issues that we have or in our motion
20 to the extent that that settlement may impact and have an effect
21 on future asbestos claimants or current asbestos claimants.

22 MR. LORELL: Your Honor, if I may, it's Jeff Lorell
23 speaking for Mr. Gross. I think that the analysis should make a
24 distinction between inquiring what Gross or any other individual
25 did generally speaking as a mediator, who they met with, on what

1 days they met with and so forth, how many hours they spent on the
2 one hand, with what was disclosed to them in confidence as part
3 of a mediation or settlement process, because in that process we
4 have, as your Honor well knows both under our local rules and the
5 rules in Delaware and the rules in Pennsylvania, very strong and
6 judicially recognized mediation privilege which makes the caucus
7 -- the confidential information to a mediator and caucus entirely
8 confident, and that confidentiality was the expectation of the
9 parties when they were disclosing whatever they disclosed to Mr.
10 McGovern, to Mr. Gross, whoever was acting as a settlement
11 facilitator. And I think it would be, as Mr. Bernick said,
12 highly inappropriate to allow discovery of the details of
13 whatever may have been given in confidence to these individuals
14 as mediators as opposed to inquiring about what their mediation
15 efforts were, who they met with, when they met, how many hours
16 they spent.

17 MR. MANCINO: Your Honor, it's Rich Mancino. What we're
18 talking about at this juncture is simply whether the documents on
19 which a privilege is claimed need to be logged and we will
20 suggest, your Honor, that to the extent that the communications
21 that went back and forth between Mr. Gross and W.R. Grace or
22 other constituencies which are claimed to be privileged be
23 logged. That doesn't mean that, and we're not asking your Honor
24 to rule on this phone call without the benefit of briefing, that

25 any privilege that might be asserted is waived.

1 MR. DEVEREAUX: Scott Devereaux. If I could just add to
2 that, it seems to me inconceivable in their roles as mediators in
3 these limited cases where Judge Wolin appointed some of these
4 individuals as --

5 THE COURT: By the way, Mr. Devereaux, I don't think
6 you'll find an order that I appointed either McGovern or Gross in
7 Sealed Air to mediate. My recollection is that the parties hired
8 them to mediate and paid them without the Court's intervention.
9 Now, I may have ultimately approved the fees that were submitted,
10 but I didn't appoint them.

11 MR. DEVEREAUX: That's a helpful clarification, your
12 Honor. I didn't mean to be unduly narrow, but in instances --

13 THE COURT: Well, you know what, you know what, maybe I'm
14 defensive when you guys use the term "court appointee". I'm
15 willing to take the heat for what I do but I'm not willing to
16 take the heat for what I didn't do.

17 MR. DEVEREAUX: That seems fair, your Honor. Let me
18 finish my point. It's Scott Devereaux still. The notices where
19 either the Court appointed a mediator or where the parties agreed
20 and asked one of these advisers to mediate their dispute,
21 regardless, the situation in total there cannot be a large volume
22 of written submissions that they now have that make it unduly
23 burdensome to just list them on a log, so, I don't think that the
24 burdensome notion -- whether or not that privilege ultimately is
25 or is not upheld by the Court is a whole different issue but from

1 the burdensome issue. I don't see anybody making a burdensome --

2 MR. BERNICK: I have to respond to that. Again, it is
3 burdensome to look for these materials to begin with, for our
4 firm to do and, so, that is specific. It is burdensome for us to
5 go rifling through files looking for these types of contacts and
6 information.

7 Number two, when you talk about the advisers themselves,
8 it's really the advisers themselves that bear the major burden of
9 this, that is, Gross and McGovern specifically, and Mr. McGovern
10 is not present on this call, Mr. Gross has counsel, but given the
11 scope of the activities that they engaged in as mediators, it
12 might be a very significant undertaking and really serves no real
13 purpose because at the end of the day we all know settlement
14 discussions are not going to be the subject of inquiry.

15 If they were, then, basically this discovery process would
16 have the effect of allowing adverse parties to discover the most
17 important work product, strategic objectives that opposing
18 counsel and opposing parties have and that would be intolerable.

19 But from what I just heard, I kind of wonder why we're
20 going down this road at all. If Judge Wolin did not specifically
21 appoint McGovern and Gross to be mediators, if they were engaged
22 as mediators with the consent of the parties, and that was true I
23 know in Sealed Air, I know it is also true in connection with the
24 activities that Professor McGovern has been involved in and
25 perhaps Mr. Gross in the Grace case, when it comes to overall

1 case resolution discussions, and if it is also true that there
2 was not a specific appointment with respect -- specific
3 appointment by Judge Wolin in the Owens Corning case, was that
4 again by agreement of the parties?

5 THE COURT: No. Owens Corning, there's an order that
6 appointed McGovern as a mediator and Judge Fitzgerald as a
7 settlement judge.

8 MR. BERNICK: Okay. And McGovern doesn't have any
9 conflicting G-1 Holdings appointment, so, the so-called
10 structural issue which is that there was an underlying conflict
11 that affected one of the advisers who had been appointed as
12 advisers when they had a simultaneous engagement in G-1 has no
13 application to these mediations, none, zero.

14 If the parties were prepared to accept whatever conflict
15 might be there, then this is a non-issue, so, why are we pursuing
16 it?

17 MR. ROBBINS: Let me explain why we're pursuing it. This
18 is Larry Robbins speaking in Washington. It may be that in some
19 discrete situation the parties, not the Court, elected a mediator
20 and that may indeed be a separate case, but the fundamental
21 question that I think has been presented on remand, there are
22 others but the most fundamental one is what precisely is the
23 scope that have been delegated or may be delegated to the
24 advisers such that a reasonable person observing that delegation
25 would regard that as in conflict with the set of duties that

1 would fall to someone serving as a lawyer for futures
2 representatives.

3 If you're theorizing that that is the governing standard,
4 it is highly material to know how the five advisers, all five,
5 have been deployed in the past because however they've been
6 deployed in the past is evidence, bears on the scope of the
7 initial delegation and that is the question presented.

8 It is not the case, as was suggested by Mr. Bernick in the
9 telephone conference the other day, that the only thing that
10 matters is how the advisers have in fact been deployed in the
11 past. That's not the question. That is, that they bear on the
12 ultimate issue but the ultimate issue remains what is the scope
13 of the delegation of the five advisers, and it is highly material
14 on that question to know how each of them has served in the past,
15 even if he is not himself someone simultaneously representing one
16 of the futures, serving as a futures representative or as counsel
17 for a futures representative. I haven't finished.

18 MR. BERNICK: Go ahead.

19 MR. ROBBINS: So, in short, that is, I think, the reason
20 why it is reasonable to ask even of an adviser who is not
21 simultaneously a futures lawyer or futures rep what is it that
22 he's done. Now, that is not to say that if there is indeed a
23 privilege applicable to the settlement process, I understand that
24 argument, it may very well be that there are particulars that we
25 may be forbidden on objection to go into, and that is a

1 reasonable concern and one that I would trust everyone on both
2 sides would be mindful of and deal with appropriately, but now is
3 simply one of logging so that we know the subject matter of the
4 relationship, the subject matter of the mediations, the subject
5 matter of the meetings. That may itself be enough to formulate
6 the type of argument that the movants need to make concerning
7 scope of the delegation. That is why it is material.

8 MR. BERNICK: I'm sorry. Are you done?

9 MR. ROBBINS: I am done now.

10 MR. BERNICK: That's interesting and important, all the
11 rest, but I have to say right now, your Honor, I would lodge a
12 further objection to all discovery conducted with respect to any
13 mediation where the mediation was undertaken by the parties on
14 their own as being irrelevant, totally irrelevant -- I'm sorry --
15 not likely to relate to the discovery of relevant evidence, even
16 on Mr. Robbins' theory of what is relevant, because if the
17 parties -- if the parties decided to ask Professor McGovern to do
18 something or decided to ask Mr. Gross to do something, and none
19 of them are complaining about what was given to these folks to
20 do, then it seems to me that even under Mr. Robbins' recitation
21 of the standard, it is irrelevant to the delegation because it
22 didn't emanate from the delegation. It emanated from the
23 parties' desire to elicit these people's expertise for a
24 particular purpose.

25 MR. ROBBINS: You pushing on an open door. I already

1 agreed to that. In Owens Corning, as his Honor, Judge Wolin,
2 pointed out moments ago, the mediation was in fact pursuant to
3 Court order as to Mr. McGovern.

4 MR. BERNICK: I understand that.

5 MR. ROBBINS: I don't have a dog in that fight.

6 MR. BERNICK: That's fine. That's not true in the Grace
7 case.

8 MR. MANCINO: Your Honor, this is Rich Mancino. If I can
9 just speak to that briefly, I don't know about pushing on an open
10 door or whether my door is closed, but I believe that the
11 services provided by Mr. Gross in connection with the Grace case,
12 even if it's in the capacity as a mediator on the Sealed Air
13 case, is relevant and I'll just point to, among other things --

14 THE COURT: Why can't you handle that in his deposition?

15 MR. MANCINO: I can and I will, your Honor, but --

16 THE COURT: Excuse me. Please go ahead.

17 MR. MANCINO: There are documents that relate to that
18 which are deemed to be privileged.

19 THE COURT: Well, you've asked Gross for those documents.

20 MR. MANCINO: That's right. And you know the Third
21 Circuit said that discovery in this case may shed light on such
22 matters as, quote, "the full extent of the consultants'
23 activities in the five asbestos cases", close quote, and W.R.
24 Grace is one of those five and we should be allowed to explore
25 that, and if there is a privilege and if the privilege attaches,

1 I'm not asking for an advisory opinion that that privilege is
2 waived or that it otherwise attaches.

3 All I'm asking is if the parties responding to the
4 discovery requests claim that documents fall within that
5 privilege, that they log them.

6 MR. BERNICK: Your Honor, I think this is a matter that's
7 ripe for your determination. Let me state before you rule on
8 this, though, that we would move to strike and we would object to
9 any discovery that is conducted with respect to the activities of
10 either Professor McGovern or Mr. Gross or any other kind of
11 discovery whatsoever concerning two subjects in the Grace case;
12 one is the mediation or settlement efforts with respect to the
13 Sealed Air-Frazenius, and the second is any kind of settlement
14 discussions or mediations with respect to the case as a whole.

15 They have no relevance either to the structural issues
16 that have been posed here because they didn't take place, those
17 activities did not take place pursuant to the Court's order and
18 did not take place pursuant to the order that was issued by the
19 Court with respect to the advisers on the outset of the case,
20 they have no relevance because they don't, and they have no
21 relevance with respect to ex parte communications because there's
22 never been an articulation of improbable ex parte communications
23 with respect to any of those matters.

24 The only ex parte communications that Mr. Mancino and his
25 client have alleged and have raised in connection with this

1 matter at all in the Grace case is their suspicions are improper
2 ex parte context with respect to the application for Mr. Hamlin
3 to be a futures representative and this, obviously, has nothing
4 whatever to do with that, so, we would object to all discovery,
5 not just the logging issue, we would object to all discovery with
6 respect to those mediation settlement efforts.

7 MR. DEVEREAUX: Your Honor, Scott Devereaux. If I may be
8 heard briefly before this is submitted or the Court hears some
9 others two things. One, under the language that Mr. Mancino
10 read, clearly the activities of these advisers in total was
11 contemplated as the proper subject of discovery, so, I think it
12 is beyond dispute that the discovery -- that this would be
13 relevant to complete the evidentiary record.

14 The second, the fact that parties in Grace may have agreed
15 to use any of these advisers in any capacity without the Court's
16 blessing or request is a potential point for them to argue down
17 the line, but as far as what these individuals have learned in
18 their -- in whatever capacity --

19 THE COURT: By the way, by the way, I have to interrupt
20 you. You're inaccurate again. Grace didn't use them. Sealed
21 Air used them and Frazenius used them, so, I just don't want your
22 statements to go unchallenged to create an inappropriate record.

23 MR. DEVEREAUX: That's fine, your Honor. In the Sealed
24 Air matter, if these advisers had a role that was the product of
25 the parties' agreement rather than the Court's appointment, that

1 may provide the respondents here an argument to make about
2 conflicts or not, those individuals being conflicted or not being
3 conflicted, but as far as whether those individuals should
4 appropriately serve as advisers to the Court in the USG matter
5 where, of course, no party in USG was asked for their consent to
6 whatever role they played in Sealed Air or Frazenius matters,
7 that really does not serve -- answer the question from our
8 perspective, in fact, not at all.

9 The information they deemed in that capacity could well be
10 the kind of information that may make their service in USG
11 questionable or in fact conflicted.

12 MR. BERNICK: It's never been raised by USG to date.

13 THE COURT: Anybody else want to be heard? I'm prepared
14 to rule.

15 MR. MONK: Your Honor, Charles Monk. I've been silent on
16 this debate but I would like to be heard briefly. I have only a
17 concern here that the issue is whether the advisers, McGovern in
18 the case of Owens Corning case was involved in mediation and time
19 spent in mediation. That's the subject that the parties brought
20 to his attention during the mediation. The position expressed by
21 any party who expected Mr. McGovern to keep that information
22 confidential in connection with the mediations I believe must
23 stay confidential.

24 The fact that he was available and spoke with the parties
25 about the mediation and facilitated the mediation I think is a

1 subject that's fair game and I would object to any discovery that
2 went into the merits of the parties' position as opposed to their
3 involvement in the mediation.

4 THE COURT: All right.

5 MR. MANCINO: Your Honor, Rich Mancino. Just one last
6 point. I object to Mr. Bernick's motion here. I think what he's
7 trying to do is to carve out of the Third Circuit's mandate a
8 relevant area of discovery and what he -- if there is a concern
9 about the confidentiality of the substantive discussions that may
10 have taken place which may in fact be privileged, to the extent
11 that questions attempt to probe those, objections to such
12 questions can be lodged and if the objection is perceived to be
13 without basis, we could bring it to the Court's attention and ask
14 for a ruling.

15 At this stage, in effect he's looking, one, for an
16 advisory opinion on this issue and, two, he's trying to put a
17 broad category of activity that consultants played in one of the
18 five asbestos cases, and what Mr. Bernick wants to do is to put
19 that beyond examination into any extent, and we would object to
20 that.

21 THE COURT: All right. Anybody else want to be heard?

22 Okay. Nobody else wanting to be heard, I'm going to put you on
23 hold for two minutes. I'll be back.

24 (There is a discussion off the record.)

25 THE COURT: Everybody back?

1 MR. BERNICK: Yes, sir. This is David Bernick. Judge
2 Dreier indicated that he thought that the remaining matters that
3 were being discussed really didn't relate to him. He wanted to
4 make sure that we told your Honor that he was leaving the call.

5 THE COURT: All right. The Court's had an opportunity to
6 listen to the argument of all people, all participants. I'm
7 satisfied that while I believe that anything that occurred in the
8 mediation is more than likely privileged, other than the fact
9 that there was a mediation, who hired him, were they paid, I'm
10 still going to require you, Mr. Bernick, to produce the log.
11 I'll then be prepared to rule on it.

12 MR. BERNICK: Okay.

13 THE COURT: You know, as I read the Third Circuit, and I
14 have their Opinion at page 22 here, when they said the full
15 extent of the consultants' activities, while I'm satisfied, and I
16 say this very candidly, that the parties are taking an extreme
17 position of what the Third Circuit really meant and what they
18 wanted, I'm going to permit it, so, let's move on. What's the
19 next issue?

20 MR. BERNICK: I don't have any further issues.

21 MR. ORSECK: The movants don't have any other issues, your
22 Honor, either. This is Gary Orseck.

23 THE COURT: All right. I want to tell you one last thing.
24 Everybody should read the case of Hall vs. Clifton Precision,
25 found in 150 Federal Rules of Decision 525 written by Judge

1 Gawthrop, and as far as I understand is still the law in the
2 Third Circuit and which I will follow.

3 MS. NADLER: Your Honor, could you repeat the name please?

4 THE COURT: Sure. It's Hall vs. Clifton Precision,
5 Division of Litton Know systems, Inc., 150 Federal Rules of
6 Decision 525. Everybody should be familiar with it when they
7 come here on the fifth. Does this complete our telephone call?

8 MR. BERNICK: I believe it does.

9 THE COURT: All right. Court will be in recess.

10 MR. ORSECK: Thank you, your Honor.

11 (Whereupon, the telephone conference is adjourned.)

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